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COURT OF CRIMINAL APPEALS
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In the

Court of Criminal Appeals of Texas

Austin, Texas

WILLIAM RHOMER,
Appellant

v.

STATE OF TEXAS,
Appellee

On Appellant's petition for discretionary review
from the Fourth Court of Appeals
San Antonio, Texas

Appellate Cause No. 04-15-00817-CR

Tried in the 290th Judicial District Court
Bexar County, Texas

Trial Cause No. 2012-CR-9066

State's Brief on the Merits

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STATEMENT OF THE CASE

William Joe Rhomer was indicted with three counts of criminal homicide—felony murder, intoxication manslaughter, and manslaughter—for causing the death of Gilbert Chavez on May 2, 2012 (C.R. at 36–37). *See* TEX. PENAL CODE §§ 19.02(b)(3), 19.04(a), & 49.08(a). The indictment contained an additional allegation that Rhomer was finally convicted of felony driving while intoxicated at the time of the instant offense. *See id*. at § 12.42(b) & (c)(1). A jury found him guilty of murder as a repeat offender (VI R.R. at 63–64) and returned a punishment verdict of 75 years confinement (VIII R.R. at 41–43; C.R. at 286). The trial court pronounced sentence in open court on December 8, 2015 (VIII R.R. at 44) and entered a judgment of conviction and certified his right to appeal on the same day (C.R. at 289–91). He timely filed a notice of appeal on December 21, 2015 (C.R. at 292). *See* TEX. CODE CRIM. PROC. art. 44.02; TEX. R. APP. P. 25.2(b) & 26.2(a)(1). The court of appeals affirmed Rhomer's conviction on April 12, 2017. *See Rhomer v. State*, 522 S.W.3d 13 (Tex. App.—San Antonio 2017, pet. granted). This Court subsequently granted his petition for discretionary review.

STATEMENT ON ORAL ARGUMENT

The State will be ready to present oral argument in accordance with this Court's submission order.

GROUNDS FOR REVIEW

Ground One: Did the appellate court, in affirming the trial court's decision to admit the police officer's expert testimony despite the officer acknowledging he had no requisite qualifications in motorcycle accident reconstruction, violate Texas Rule of Evidence 702?

Ground Two: In relying on *Nenno*, instead of *Kelly*, did the appellate court apply an incorrect standard when determining that an accident reconstruction expert's testimony was reliable even though he applied no scientific theory or testing from that field and he had no qualifications in the field of motorcycle accident reconstruction?

Ground Three: Should the less rigid *Nenno* standard apply, as opposed to the *Kelly* standard, when an expert in a technical scientific field chooses to not apply any of the scientific testing or theory from that field to a particular case?

STATEMENT OF FACTS

This case arose out of an early morning head-on collision between Rhomer's Mercury Sable and Gilbert Chavez's Harley Davidson motorcycle on May 2, 2012. Mario Negron and Kenneth Ferrer came upon the accident while driving west on Nakoma Avenue and drove through the debris (III R.R. at 140). They approached Gilbert, who was badly injured and lying on the ground near his motorcycle (III R.R. at 94–95, 126–27). While Mario was calling for help, Rhomer approached Gilbert and, while leaning over his body, stated, "He looks ok" (III R.R. at 95, 128–29). Kenneth recalled hearing Rhomer ask them to not call the police because he had been in trouble before (III R.R. at 129). Kenneth observed Rhomer pacing back and forth from his crashed car and slurring his words as he spoke (III R.R. at 130). Kenneth told the responding police officer that Rhomer was intoxicated (III R.R. at 149).

Officer Sean Graham arrived at the scene and initially detained Rhomer after observing signs of intoxication (III R.R. at 161–62, 171). Rhomer told Graham that he was coming from a nearby bar, Coco Beach, and that Gilbert caused the accident by coming into his lane (III R.R. at 162). Having viewed the location of the crashed vehicles and the debris on the roadway, Graham did not believe the collision occurred in Rhomer's lane (III R.R. at 165–70).

Officer Steven Rivas arrived to evaluate Rhomer for possible intoxication. Rivas immediately observed a strong odor of alcohol and blood shot eyes when he approached him (IV R.R. at 154). Rhomer attempted to explain to Rivas how the accident happened, however, his account was inconsistent because he said that Gilbert hit him on the right side but then changed his mind and said it was the left. He also said that Gilbert came up from behind him (State's Ex. 36 at 3:49 time stamp ["I'm gonna be honest, I shouldn't have been driving, but I left there, he got on my ass and tried to go around me."]). This led Rivas to conclude that Rhomer was not fully aware of his surroundings at the time of the accident (IV R.R. 156). Rhomer admitted to Rivas that he was drinking at Coco Beach and that he drank "too much" and should not have been driving (IV R.R. at 158; State's Ex. 36 at 3:49 time stamp). Rivas requested that Rhomer perform field sobriety tests, but he refused (IV R.R. at 164). Based on his observations, Rivas concluded that Rhomer was intoxicated due to alcohol (IV R.R. at 166).

Rhomer was arrested and refused to provide a specimen of blood (State's Ex. 36 at 3:57 time stamp). After being placed in the back of Rivas's patrol car, he passed out while being transported to the booking facility (IV R.R. at 178; State's Ex. 36). Rivas obtained a specimen of Rhomer's blood over his refusal pursuant to the mandatory blood draw provision of the Transportation Code. *See* TEX.

TRANSP. CODE § 724.012(b). The trial court suppressed this evidence (III R.R. at 57). *See Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

Gilbert was taken to University Hospital where he died from his injuries. Bexar County Medical Examiner Dr. Randall Frost testified that Gilbert received a compound fracture to his left femur with bone exposed through a large laceration (III R.R. at 232). He concluded that Gilbert died from multiple blunt force injuries consistent with a traffic collision (III R.R. at 232).

Frost also noted that Gilbert had in his system 0.02 milligrams per liter of methamphetamine (III R.R. at 257). Meth is a stimulant, like caffeine or cocaine, and it has a range of side effects from increased blood pressure and heightened sense of alertness to seizures, paranoia, and overt psychosis (III R.R. at 243, 257). Based on the level alone, Frost could not draw any conclusion as to whether, or to what degree, Gilbert may have been impaired by the meth (III R.R. at 258, 263, 267 ["I don't know whether any of these drugs had any effect on him at all."]).

Finally, Samantha Chavez testified that on the day he died, Gilbert road out to Bandera to work on his motorcycle (V R.R. at 62). He called her at 2:45 AM and told her he was on his way home (V R.R. at 63). She and Gilbert lived in an apartment just west of US 281 and near the site of the accident (V R.R. at 65). Gilbert never came home.

Opinion Testimony by Detective Doyle

Detective John Doyle has been a police officer for 23 years (III R.R. at 269–70). At the time of this case, he was assigned to SAPD's Traffic Investigation Detail (III R.R. at 274). To qualify for this position, Doyle has taken advanced courses in accident reconstruction (III R.R. at 275). Doyle has not, however, taken any courses specializing in motorcycle reconstruction and he noted that he does not believe such a course is offered in Texas (III R.R. at 326–27; IV R.R. at 73). He has taken courses on accidents involving pedestrians and bicycles, the latter of which is similar to motorcycle reconstruction because it involves human bodies with a higher center of gravity (III R.R. at 327; IV R.R. at 74). During his tenure in the Traffic Investigation Detail, Doyle has examined hundreds, perhaps over one thousand, accident scenes—including numerous accidents involving motorcycles (III R.R. at 287; IV R.R. at 44)

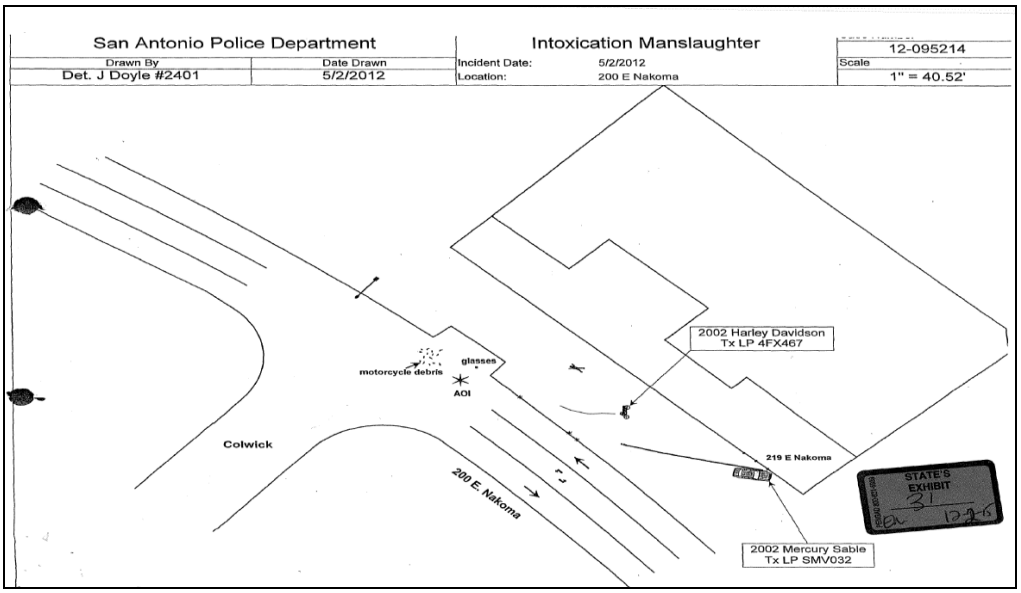
Doyle stated that while there are differences between car and motorcycle accident reconstruction, the basic facts are the same and the differences mostly concern speed calculations (III R.R. at 328). In any event, he is trained to survey an accident scene by taking precision measurements (III R.R. at 279–82). If possible, he uses the data obtained from the observations and measurements to mathematically estimate the pre-impact speed of a vehicle (III R.R. at 283–85).

In this case, Doyle arrived at Nakoma and walked through the scene looking for debris, tire marks, and other roadway evidence (III R.R. at 290–92). He also inspected the damage to each vehicle (III R.R. at 306, 314–18). Afterwards, he used a Sokkia total station—an instrument used for precision surveying—to map the location of debris, curbs strikes, scrapes, the location of the vehicles, and the dimensions of the road (III R.R. at 299–300). Using these measurements, his personal knowledge of the scene and the vehicle damage, a map of the area, and photographs taken that night, Doyle formed a general opinion of how the accident occurred:

> Basically that the vehicle driven by the defendant straightened out the cur[ve], hit the motorcycle in the -- his traffic lane, in the oncoming traffic lane. The motorcyclist was struck by the left front corner of the car. He went over the car and the vehicle was -- motorcycle was pushed backwards into the parking lot. The vehicle continued on in its same direction resulting in ultimately the death of the complainant.

(III R.R. at 306, alteration added).

Doyle's scaled diagram of the accident was admitted into evidence along with several photographs of the accident scene. The scaled diagram shows the spacial relationship between the motorcyle, Gilbert's body, Rhomer's car, and various other evidence to the curve of East Nakoma.



(State's Ex. 31).

Doyle stated that the debris, tire marks, and scrapes support his theory of how the collision occurred (III R.R.at 309). The damage to the vehicles indicate that the motorcycle hit the car on the driver's side and the motorcycle and Gilbert both sustained injuries on the left side—the front left corner of the car was damaged and blood-stained while a portion of the car's bumper was lodged into the left side of the bike's cooling fins and the brake disc on the left side of the front wheel was bent, also Gilbert had a broken left femur (III R.R. at 314–18; IV R.R. at 51, 55).

(State's Ex. 26).

(State's Ex. 17, car bumper in cooling fin circled).

(Cropped from State's Ex. 4, bent brake disc circled).

Based on his own experience riding a motorcycle, Doyle estimated that Gilbert may have tried to avoid Rhomer at the last minute because a motorcyclist typically leans into a turn and the fact that the Gilbert's motorcycle sustained damage to the left side was indicative that he may have straightened out or leaned to the right at the last minute (IV R.R. at 54–55). Doyle also noted that there were no apparent skid marks around the area of impact, leading him to believe that neither vehicle made any abrupt maneuvers (braking or sharp turns) prior to impact (IV R.R. at 60, 123–24). According to Doyle, the evidence was consistent with a theory that Rhomer was impaired by alcohol during the accident (IV R.R. at 66).

Detective Doyle's observations and conclusions can be summarized in a list as follows:

- Detective Doyle was aware that Rhomer stated he was coming from Coco Beach, which was two blocks west of the accident scene on Nakoma (IV R.R. at 26).
- Detective Doyle observed in the west-bound lane of Nakoma a debris field containing pieces of Gilbert's motorcycle (III R.R. at 309–10).
- Detective Doyle observed three curb-strikes on the north side of Nakoma (III R.R at 297, 312). Between the resting place of the motorcycle and one of the curb-strikes was a scrape mark (III R.R. at 309; State's Ex. 31). Between the resting place of the car and the other two curb strikes was another scrape mark (III R.R. at 315–16; State's Ex. 31).
- Rhomer's car was damaged on the front left (driver's side) corner (III R.R. at 314; IV R.R. at 52–53). There was blood on

the hood adjacent to the damage and pieces of human tissue on top of the car and near the rear windshield (III R.R. at 316–17).

- Gilbert suffered a large laceration on his left thigh (State's Ex. 9; IV R.R. at 51, 55). Part of Rhomer's front bumper was stuck in the cooling fins on the left side of Gilbert's motorcycle (III R.R. at 315). The braking disc (or rotor) on the left side of the bike's front wheel was bent (III R.R. at 314).

- Due to a difference in mass, the smaller motorcycle was pushed backwards by the larger car (III R.R. at 332–33).

- Based on general physics, Gilbert's body would have remained in motion until being redirected by the car (IV R.R. at 119–20).

Doyle did indicate that he was unable to mathematically determine the pre-impact speed of each vehicle because (1) the weight differential between the two vehicles was likely greater than four to one and (2) Appellant's car came to an unnatural stop against the building (III R.R. at 320). In any event, Doyle did not testify that speed was a factor in this accident (III RR at 333).

A jury returned verdicts of guilt on all counts and Appellant was sentenced to confinement for 75 years in the Texas Department of Criminal Justice.

The court of appeals opinion may contain a misstatement of Detective Doyle's opinion.

The court of appeals understood Doyle to have testified that Rhomer failed to negotiate a curve "as Colwick curved into Nakoma." *Rhomer*, 522 S.W.3d at 18. The State's understanding of Doyle's testimony is that Rhomer failed to negotiate the curve on Nakoma *near* the intersection of Colwick. This

understanding is consistent with Rhomer's admission that he was coming from the Coco Beach Bar, which is on Nakoma and only a few blocks from the location of the collision (III R.R. at 162).

In this respect, the State agrees with the statement in Rhomer's brief: "Appellant was travelling on Nakoma and never was on Colwick" (Appellant's Brief on the Merits at 1, n.1). State's Exhibit 33 shows the curve of Nakoma as from an eastbound perspective. The red arrow represents the flow of traffic in the west-bound lane headed from Coco Beach to U.S. 281.

(State's Ex. 33). Colwick is in the top right quadrant of State's Exhibit 33. According to Doyle's opinion, the accident would have occurred in the west bound lane in the top left quadrant of the picture.

SUMMARY OF THE ARGUMENT

Ground One: Did the appellate court, in affirming the trial court's decision to admit the police officer's expert testimony despite the officer acknowledging he had no requisite qualifications in motorcycle accident reconstruction, violate Texas Rule of Evidence 702?

Response: The court of appeals did not violate Rule 702 because Detective Doyle had personal knowledge of the accident scene and extensive training and experience investigating collisions. Furthermore, this was a simple two-vehicle collision where Doyle's testimony simply assisted the jury in grasping the inescapable conclusion that the accident occurred in Gilbert's lane.

Ground Two: In relying on *Nenno*, instead of *Kelly*, did the appellate court apply an incorrect standard when determining that an accident reconstruction expert's testimony was reliable even though he applied no scientific theory or testing from that field and he had no qualifications in the field of motorcycle accident reconstruction?

Ground Three: Should the less rigid *Nenno* standard apply, as opposed to the *Kelly* standard, when an expert in a technical scientific field chooses to not apply any of the scientific testing or theory from that field to a particular case?

Response: Grounds two and three are essentially the same. The court of appeals correctly decided that Doyle offered a nonscientific opinion under the *Nenno* standard. The *Kelly* standard should apply to accident reconstruction when an expert makes a mathematical calculation. In this case, Doyle surveyed the scene and then drew logical, common sense conclusions. Under the facts of this particular case, this type of reconstruction should be governed by *Nenno*.

ARGUMENT

Rhomer asks this Court to overturn the trial court and the court of appeals because Detective Doyle did not have a particular degree or certification and because his opinion was not the product of a scientific theory or technique (Appellant's Brief on the Merits at 12–13). The text of Rule 702 does not require an expert to possess a particular degree or certification, nor does it limit expert testimony to only those opinions supported by hard science. TEX. R. EVID. 702. The State is unaware of any decisions by this Court, since the adoption of the Texas Rules of Evidence, which examine the admissibility of expert testimony in the field of accident reconstruction.[1]

Standard of Review: Abuse of Discretion

An appellate court reviews a trial court's ruling on the admission of evidence for an abuse of discretion. *Rodgers v. State*, 205 S.W.3d 525, 527–28 (Tex. Crim. App. 2006). "[A] trial court has great discretion in determining whether a witness possesses sufficient qualifications to assist the jury as an expert on a specific topic in a particular case." *Id*. A trial court's ruling will not be

[1] This Court has examined accident reconstruction prior to the adoption of the current rules. *See Salem v. State*, 367 S.W.2d 335, 336–37 (Tex. Crim. App. 1963) (police officer with extensive experience qualified to offer opinion on vehicle speed); *Wallace v. State*, 160 S.W.2d 256, 257 (Tex. Crim. App. 1942) (police officer with less experience not qualified to offer opinion).

overturned on appeal unless it falls outside of the zone of reasonable disagreement. *Blasdell v. State*, 470 S.W.3d 59, 62 (Tex. Crim. App. 2015). A trial court's ruling will be upheld if it is correct under any theory applicable to the case. *Weatherred v. State*, 975 S.W.2d 323, 323 (Tex. Crim. App. 1998).

Applicable Law: Texas Rules of Evidence 701 and 702

Opinion Testimony by Lay and Expert Witnesses

Any witness may testify in the form of an opinion if the testimony is rationally based on the witness's perception and helpful to determining a fact in issue. TEX. R. EVID. 701. This rule requires a witness to acquire through their senses the information that is the basis of the opinion. *Osbourn v. State*, 92 S.W.3d 531, 535 (Tex. Crim. App. 2002). The witness must personally observe or experience what he or she is forming an opinion about. *Id.*

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. Expert opinion must be supported by sufficient facts and data. TEX. R. EVID. 705(d). This Court previously observed that there is no distinct line between lay opinion and expert opinion. *Osbourn*, 92 S.W.3d at 537.

Requirements of Expert Testimony under Rule 702

Expert testimony is admissible if "(1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case." *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006). Stated simply, the expert must be qualified and the testimony must be reliable and relevant. *Id.*

Regarding the qualification requirement, a court should consider (1) the complexity of the field of expertise, (2) how conclusive the opinion is, and (3) how central the testimony is to the resolution of the case. *Vela*, 209 S.W.3d at 131 (citing *Rodgers v. State*, 205 S.W.3d 525 (Tex. Crim. App. 2006)). "If the expert evidence is close to the jury's common understanding, the witness's qualifications are less important than when the evidence is well outside the jury's own experience." *Rodgers*, 205 S.W.3d at 528.

The requirements for reliability vary depending on the nature of the opinion. When an expert's opinion is based on "hard science," it must satisfy the *Kelly* test: "(1) the underlying scientific theory must be valid, (2) the technique applying the theory must be valid, and (3) the technique must have been properly applied on the occasion in question." *Morris v. State*, 361 S.W.3d 649, 654 (Tex. Crim. App. 2011) (citing *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992)).

However, when the opinion embraces "soft science" or nonscientific subject matter, Rule 702 requires a different analysis, the *Nenno* test: "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." *Morris*, 361 S.W.3d at 654 (citing *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998)). There is no rigid distinction between hard and soft science. *Morris*, 361 S.W.3d at 654–55 (citing *Nenno*, 970 S.W.2d at 560–61).

Rules 701 and 702 in the context of police officers offering opinions on car accidents

The courts of appeals have addressed lay and expert opinions by police officers in the context of collisions and accidents on several occasions. In *Ventroy v. State*, 917 S.W.2d 419 (Tex. App.—San Antonio 1996, pet. ref'd), the Fourth Court of Appeals recognized that police officers can be qualified as experts and testify about collisions. In that case an officer who made observations at the scene of a vehicular homicide testified to his opinion on the point of impact and the direction of travel of the defendant's vehicle. *Id.* at 421. The court of appeals held that the officer could offer opinions under both Rule 701 and 702 because he had personally investigated the scene and had experience investigating automobile accidents. *Id.* at 422. The opinion suggests that the testifying officer was not qualified in scientific accident reconstruction.

The Twelfth Court of Appeals arrived at a similar conclusion in *Brown v. State*, 303 S.W.3d 310 (Tex. App.—Tyler 2009, pet. ref'd). In *Brown*, the first of two officers testified that he had not been formally trained in accident reconstruction; however, he did testify that a collision occurred in the victim's lane based on his observation of debris, fluid, and gouges on the roadway. *Id.* at 319–20. The Twelfth Court concluded that the officer's opinion was admissible under Rule 701. *Id.* at 320–21. A second officer, who had received additional training in collisions, offered an opinion with more detail based on measurements. This officer did not draw any conclusions based on mathematical formulas, but he was able to conclude that the defendant swerved into the victim's lane of travel. *Id.* Like the court of appeals in *Ventroy*, the Twelfth Court held that this opinion was admissible under Rules 701 and 702. *Id.* at 321. In reaching this conclusion, the Twelfth Court expressed doubt that a "formal accident reconstruction" was necessary to determine the cause of a collision. *Id.*

Neither *Ventroy* nor *Brown* cite to the *Nenno* line of cases (*Ventroy* predates *Nenno*), however, the reasoning and outcome of both cases are consistent with *Nenno's* test. *See Morris*, 361 S.W.3d at 654 ("… by its terms, Rule 702, by applying to 'technical or other specialized knowledge,' permits even nonscientific expert testimony.").

In a civil case with some factual similarity to *Brown*, the Fourteenth Court of Appeals held that a trial court did not err by allowing one officer to testify about his observations on the road, and to his opinion of which car crossed a median before a collision. *Thomas v. Uzoka*, 290 S.W.3d 437, 447–48 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

The Fourth Court of Appeals, however, has held that a witness may not testify to an opinion about the cause of an accident or collision merely because he or she is a police officer. *Gainsco County Mut. Ins. Co. v. Martinez*, 27 S.W.3d 97, 104 (Tex. App.—San Antonio 2000, pet. granted) (lower courts' judgments vacated pursuant to Rule 56.3). In *Gainsco County Mut. Ins. Co.*, the court of appeals held that a trial court erred in allowing an officer with minimal training and four months experience to testify about "vehicle speed and force of impact." *Id.* at 104–05.

Accordingly, when a police officer testifies about a hard scientific conclusion, such as the speed of a vehicle during or before impact, at least two courts of appeals have insisted that the opinion must be qualified under the more rigid *Kelly* test. In *DeLarue v. State*, 102 S.W.3d 388 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd), the Fourteenth Court held that a trial court properly admitted a specially trained officer's opinion regarding speed and the direction a passenger was ejected from a car because the testimony was qualified under *Kelly*.

Id. at 398–400. Similarly, in *Pena v. State*, 155 S.W.3d 238 (Tex. App.—El Paso 2004, no pet.), the Eighth Court of Appeals concluded that an officer was not qualified under *Kelly* because he could not explain the scientific principles behind his speed calculation. *Id.* at 246.

The First Court of Appeals, however, applied *Nenno* in *Chavers v. State*, 991 S.W.2d 457, 460–61 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). In that case an officer testified to an opinion about the speed of a bus based in part on the road surfaces "coefficient of drag." *Id.*

While the courts of appeals have not always uniformly articulated the law in the above cited cases, they have been fairly consistent in their results. The above precedent can be distilled down to the following:

- A police officer may not offer an expert opinion merely because he is a police officer. *See DeLarue*, 102 S.W.3d at 396; *Gainsco County Mut. Ins. Co.*, 27 S.W.3d at 104–05.
- A police officer with sufficient personal knowledge of an accident scene may offer a limited lay opinion regarding the accident, such as where a collision occurred, under Rule 701. *See Brown*, 303 S.W.3d at 320–21; *see also Lopez-Juarez v. Kelly*, 348 S.W.3d 10, 19 (Tex. App.—Texarkana 2011, pet. denied) ("Any lay person who observes an accident scene involving skid marks and the final resting places of the vehicles may have an opinion as to what occurred and who was at fault.").[2]

[2] *See also Elliott v. State*, No. 13-13-00220-CR, 2015 Tex. App. LEXIS 4042, at *15–19 (Tex. App.—Corpus Christi Apr. 23, 2015, no pet.) (mem. op., not designated for publication) (upholding trial court's ruling to allow police officers to testify about diagram of area of impact in crash under Rule 701).

- A police officer may be qualified as an expert based on knowledge of an accident scene and prior experience investigating accidents and be allowed to offer a nonscientific opinion under Rule 702. *See Ventroy*, 917 S.W2d at 421–22; *Brown*, 303 S.W.3d at 321.
- A police officer's opinion must be qualified under *Kelly* if it embraces a hard scientific conclusion, such as calculating the precollision speed of a vehicle. *See DeLarue*, 102 S.W.3d at 397–400; *Pena*, 155 S.W.3d 246; *Wooten v. State*, 267 S.W.3d 289, 303–04 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *but see Chavers*, 991 S.W.2d at 460–61 (applying *Nenno* to determination of crash speed).

Taken has a whole, this precedent forms a spectrum of admissibility for police officer opinion testimony. *See Osbourn*, 92 S.W.3d at 537 (declaring there is no distinct line between lay opinion and expert opinion.); *Morris*, 361 S.W.3d at 654–55 (declaring there is no distinct line between scientific and nonscientific expert opinions). On one end is lay testimony and on the other is expert testimony embracing hard scientific calculations.

Response to First Ground:

The court of appeals did not violate Rule 702 because Detective Doyle had personal knowledge of the accident scene and extensive training and experience investigating collisions. Furthermore, this was a simple two-vehicle collision where Doyle's testimony simply assisted the jury in grasping the inescapable conclusion that the accident occurred in Gilbert's lane.

The trial court's decision to qualify Doyle as an expert in this case is reasonable because Doyle's testimony was either lay witness testimony under Rule 701 or nonscientific expert testimony under Rule 702. *See Ventroy*, 917 S.W.2d at

421–22 (upholding trial court's ruling on officer testimony regarding how collision happened under both Rules 701 and 702); *Brown*, 303 S.W.3d at 321 (same). Doyle has years of experience as a police officer and has investigated hundreds of collisions as a detective in San Antonio's specialized TID unit, including numerous accidents involving motorcycles (III R.R. at 274–75; IV R.R. at 44). Additionally, he has received hundreds of hours of advanced training in accident investigation (III R.R. at 275; IV R.R. at 73).

In his first ground, Rhomer faults Doyle for not having a formal course in motorcycle accident reconstruction. This ground should be overruled for a few reasons. First, the text of Rule 702 does not require a particular degree or certification; an expert may be qualified by any combination of "knowledge, skill, experience, training, or education." TEX. R. EVID. 702; *see Gregory v. State*, 56 S.W.3d 164, 179–80 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd as improvidently granted) (noting that Rule 702 does not require a particular degree or certificate). This Court has never endorsed such a bright-line approach to Rule 702 and it should not start with this case.

Second, Doyle did have formal training on accident investigations involving cars and bicyclists, the latter of which is similar to motorcycle reconstruction due to the relatively high center of gravity of the rider (III R.R. at 327; IV R.R. at 74). He also was an experienced motorcycle rider himself and had investigated

numerous crashes involving motorcycles (IV R.R. at 44, 55). This background places Doyle's qualifications on par with, or in excess of, the qualifications of other police officers who have offered opinion testimony in similar cases, albeit with no apparent formal training in accident reconstruction. *See Ventroy*, 917 S.W2d at 421–22 (officer without formal training in accident reconstruction allowed to testify from experience); *Brown*, 303 S.W.3d at 320–21 (same); *see also Thomas*, 290 S.W.3d at 447–48 (allowing similar opinion testimony under Rule 702 in a civil case).

Doyle's observations and analysis can be classified into at least two categories. Doyle used his accident reconstruction training and knowledge of the case to reconstruct the general trajectory of Rhomer's car from Coco Beach to Nakoma to the parking lot on the north side of Nakoma adjacent to Gilbert's lane (III R.R. at 308). This portion of Doyle's testimony embraced the nonscientific aspect of Rule 702 in that he used techniques and equipment unavailable to the lay person. Then Doyle used his observations of the damage on the vehicles to form a common-sense conclusion that the front left portion of Rhomer's car struck Gilbert causing damage to his left thigh and the left side of the motorcycle (III R.R. at 314, 317). This portion of Doyle's testimony is more akin to lay opinion testimony under Rule 701, albeit with the benefit of hours of specialized training and years of experience.

Third, Rhomer turns the qualification standard on its head. The relevant question is not whether Doyle was lacking a particular qualification; the relevant question is whether he could assist the jury with the qualifications that he did possess. In this case, the jury was confronted with photographs of damaged vehicles, curb strikes, and scrape marks. Detective Doyle, through a combination of personal knowledge of the scene and his qualifications, assisted the jury in resolving the question of causation. *See Rodgers*, 205 S.W.3d at 533 (trial court properly admitted testimony of fingerprint expert for opinion on tire and shoe prints because it could assist the jury).

Fourth, if a defendant is dissatisfied with the qualifications of the State's expert, he may always seek out his own expert and offer the jury a rebuttal opinion. This is not to say that the State can abdicate its burden as the proponent. It simply means that once the State has qualified its expert to assist the jury, a defendant can either attack the expert's credibility by showing the jury he lacks an additional certification or degree, or he can present his own expert testimony to show the accident did not happen as the prosecution claims.

Response to Second and Third Grounds:

> Grounds two and three are essentially the same. The court of appeals correctly decided that Doyle offered a nonscientific opinion under the *Nenno* standard. The *Kelly* standard should apply to accident reconstruction when an expert makes a mathematical calculation. In this case, Doyle surveyed the scene and then drew logical, common sense conclusions. Under the facts of this particular case, this type of reconstruction should be governed by *Nenno*.

These two grounds alternately ask the same question: Is opinion testimony concerning the cause of a collision always governed by the scientific aspect of Rule 702? How Rule 702 applies to a particular traffic accident should depend on the method by which the expert arrives at his opinion and the nature and complexity of the accident. In this case, Detective Doyle's testimony should not be analyzed under a scientific standard because he did not offer a scientific opinion. Thus, the answer to Rhomer's second and third grounds are "no" and "yes" respectively.

Detective Doyle's opinion was reliable because the subject matter of his testimony was within the scope of a legitimate field and used principles within that field. *Morris*, 361 S.W.3d at 654 (citing *Nenno*, 970 S.W.2d at 561). Doyle took careful measurements of the roadway, the debris located in the west bound lane, the location of scrapes and curb strikes, and the location of the vehicles in the parking lot on the north side of Nakoma (III R.R. at 299–300; State's Ex. 31). He examined the damage on the vehicles and also considered Gilbert's injuries (III

R.R. at 314–18; IV R.R. at 51, 55). Putting these puzzle pieces together within the greater context of the curve on Nakoma and the location of the bar where Rhomer had been drinking, he arrived at the only rational conclusion available—Rhomer straightened a curve in the road and was in the wrong lane when the crash happened. The scope of Doyle's opinion (where and how the crash occurred) as well as the principles he utilized (mapping the scene and inspecting physical evidence) [3] fall within the class of expert opinions contemplated by *Nenno* and its progeny.

Rhomer correctly quotes some lower courts as characterizing accident reconstruction as scientific (Appellant's Brief on the Merits at 16–17, 25). These cases typically involve an opinion involving a pre- or post-impact speed calculation. *See Wooten*, 267 S.W.3d at 303–04; *Pena*, 155 S.W.3d at 246; *DeLarue*, 102 S.W.3d at 398. The State has no problem with scrutinizing a police officer's testimony under the *Kelly* standard when the officer offers an opinion

[3] Other jurisdictions have recognized these principles as well. *See Madrid v. Robinson*, 931 P.2d 791, 794–95 (Or. 1997) (Trial court did not abuse discretion by allowing an expert to testify to ultimate issue of causation based on area of impact); *State v. Turner*, 1991 Tenn. Crim. App. LEXIS 79, *12-13 (Tenn. Crim. App. Feb. 4, 1991) (area of impact testimony admissible despite expert not being trained in physics); *Messina v. Prather*, 42 S.W.3d 753, 764 (Mo. Ct. App. 2001) (officer relied on scaled diagram and crash scene photos in forming opinion of how crash occurred); *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000) (recognizing the role of computer generated diagrams in accident investigation); *Fry v. King*, 950 N.E.2d 229, 238 (Ohio Ct. App. 2011) (opinion testimony properly admitted based on diagrams, photographs, and personal knowledge of crash scene).

based on a mathematical calculation. In those cases, the *Kelly* standard is appropriate.

But courts should not be confined to the *Kelly* standard when confronted with a simple, two-vehicle collision where speed is not an issue. *See Ventroy*, 917 S.W.2d at 421–22; *Brown*, 303 S.W.3d at 321; *Thomas*, 290 S.W.3d at 447–48. Doyle's analysis emphasized the area of impact, the damage to the vehicles, and curb strikes and scrapes leading to the resting place of Rhomer's car (III R.R. at 306). To assist the jury, Doyle used physical evidence to put together a fairly simple jigsaw puzzle. The locations of the debris in the west-bound lane, the curb strikes adjacent to the west-bound lane, and the resting place of Rhomer's car in the parking lot north of the west-bound lane form a near straight line and establish that Rhomer's east-bound car crossed over the entire turn lane and into the west-bound lane. The damage to the left side of the motorcycle correlates to the front left corner of the car. In fact, part of Rhomer's car was still lodged in the motorcycle's cooling fins. Similarly, the blood on the front left corner of Rhomer's hood fits with the large laceration on Gilbert's left thigh. The portion of the puzzle that shows the trajectory of Rhomer's car fits neatly with the portion showing the damage to the vehicles because the left side of Gilbert's west-bound motorcycle would have been vulnerable to the front, left side of Rhomer's car as it drifted leftward into Gilbert's lane.

There is no other conceivable way this puzzle can be assembled. The pieces cannot be rearranged to place the collision in the east-bound lane and they certainly cannot be assembled with Gilbert passing Rhomer from behind. The jury could have completed this puzzle using their own common sense and without Doyle's ultimate opinion. *See Rodgers*, 205 S.W.3d at 527 ("A trial court need not exclude expert testimony simply because the subject matter is within the comprehension of the average jury."); *Lopez-Juarez*, 348 S.W.3d at 19 ("Any lay person who observes an accident scene involving skid marks and the final resting places of the vehicles may have an opinion as to what occurred and who was at fault.").

Along these lines, the trial court allowed another, less-experienced patrolman to testify that the accident did not occur in the east-bound lane based on his observation of the debris and the resting place of the vehicles. *Rhomer*, 522 S.W.3d at 22–23. The court of appeals concluded that this was admissible lay testimony and Rhomer does not challenge this ruling on discretionary review. *Id.* at 23. The admissibility of Officer Graham's lay opinion that the accident did not happen in the east-bound lane cannot be reconciled with Rhomer's insistence that the more-qualified Doyle could not testify that the accident occurred in the west-bound lane.

Detective Doyle made limited reference to basic scientific principles that are comprehensible to lay persons.

There are two points in the record where Detective Doyle ventured into the area of physics. Doyle testified that Rhomer's car pushed Gilbert's motorcycle from the area of impact in the west-bound lane into the parking lot on the north side of Nakoma because moving objects with greater mass tend to displace objects with smaller mass (III R.R. at 332). Doyle also testified that Gilbert's body traveled over the corner of Rhomer's car and ended up in the same parking lot because an object in motion remains in motion until it is redirected by another force (IV R.R. at 119–20). To the extent these conclusions qualify as "scientific evidence," they do not undermine the trial court's ruling.

First, it does not appear that either of these conclusions is in serious dispute, nor do they have much bearing on Doyle's ultimate opinion. And neither is critical to the State's theory of the case. If Rhomer's car and Gilbert's motorcycle had collided head-on in the east-bound lane, Gilbert still would have flown off his bike until being redirected by the car and Rhomer's larger car would have invariably displaced Gilbert's smaller motorcycle. Second, Doyle did not claim to quantify any aspect of the accident in terms of momentum, energy, or force.

The crux of Doyle's opinion was not the fact of displacement (because both vehicles were indeed displaced off the road and Gilbert was indeed thrown off his

bike); rather the opinion was based on the roadway evidence indicating the direction that both the vehicles were displaced (III R.R. at 306). From an east-bound perspective at the accident scene, Nakoma veers to the right (south) (State's Ex. 33). The fact that there was a debris field in the west-bound lane, there were curb strikes on the north side of the west-bound lane, and there were scrape marks leading to vehicles resting in the parking lot north of Nakoma establishes that Rhomer was at fault. This conclusion can be reached using common sense, with or without the aid of Sir Isaac Newton's more-than-300-year-old law.[4]

The second and third grounds assume an incorrect premise.

The State disagrees with the premise behind Rhomer's third ground—that Doyle *chose* not to apply a scientific theory. Doyle testified that he was trained to scientifically analyze speed and momentum; however, the particular methods in which he was qualified did not allow him to make a calculation when the weight differential between vehicles approaches a ratio of four-to-one or when one of the vehicles comes to an unnatural stop, such as Rhomer's car coming to an unnatural stop at the foot of a building (III R.R. at 320). Detective Doyle also noted that

[4] It does not take a university professor or a motorcycle expert to explain the law of inertia to a jury. A child riding a skateboard into a pothole, a teenager abruptly slamming the brakes of a car, and a college kid shooting billiards all understand this concept. As human beings we all live our entire lives with the limitations and consequences of this law.

estimating a motorcycle's speed involved unique calculations and he readily admitted that he had not taken that particular course (III R.R. at 328).

The State also notes that Rhomer has not presented this Court with any authority suggesting that a traffic investigator must use a scientific theory and technique to establish a general area of impact in a simple, two-vehicle collision. To the contrary, the prevailing authority suggests that a police officer without formal training or, perhaps, a lay person can form an opinion as to how an accident happened based on a general area of impact, scrapes and skids, resting place of vehicles, and plain common sense. *See Brown*, 303 S.W.3d at 319–321 (allowing officers to offer opinions about cause of crash without mathematical calculations); *Ventroy*, 917 S.W.2d at 421 (allowing officer to offer opinion about causation based on training and experience); *Lopez-Juarez*, 348 S.W.3d at 19 ("Any lay person who observes an accident scene involving skid marks and the final resting places of the vehicles may have an opinion as to what occurred and who was at fault.").[5]

[5] The lower court's ruling is consistent with other jurisdictions, as well. *See Smith v. Davis*, 663 S.W.2d 165, 166 (Ark. 1983) ("Where an officer investigates a vehicle accident, observes sufficient relevant evidence such as skid marks, debris from the vehicles, position of the vehicles, or makes other observations, and where he can rationally form an opinion about the point of impact, he should be allowed to testify as to that opinion."); *Goslin v. Bacome*, 489 P.2d 242, 243 (Ariz. 1971) ("[W]here an officer is shown to have had proper training and experience in the investigation of traffic accidents, he may properly give an opinion as an expert witness as to the point of impact where his opinion is based on such indicia as the location of the debris on the highway, damage to the vehicles, and marks on the highway."); *Madrid*, 931 P.2d at 794–95 (Trial court did not abuse discretion by allowing an expert to testify to ultimate issue of causation

On the subject of experts, Judge Cochran recently wrote that "Texas law has long allowed such experiential 'horse sense' expertise." *Morris*, 361 S.W.3d at 671 (Cochran, J., concurring). Using plain "horse sense," Officer Graham, Detective Doyle, and twelve jurors concluded that this accident occurred because Rhomer drunkenly drove his car into the wrong lane hitting Gilbert.

based on area of impact); *Loseke v. Mables*, 577 N.E.2d 796, 799 (Ill. Ct. App. 1991) (trail court did not err in allowing officer who was not accident reconstructionist to testify to point of impact based on experience); *Turner*, 1991 Tenn. Crim. App. LEXIS 79, *12-13 (area of impact testimony admissible despite expert not being trained in physics); *Messina*, 42 S.W.3d at 764 (officer relied on scaled diagram and crash scene photos in forming opinion of how crash occurred); *Fry*, 950 N.E.2d at 238 (opinion testimony properly admitted based on diagrams, photographs, and personal knowledge of crash scene).

PRAYER

WHEREFORE PREMISES CONSIDERED, the Appellee-Respondent State respectfully requests that this Court affirm the opinion and judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nathan E. Morey, hereby certify that a true and correct copy of the above and forgoing brief was emailed to Dayna Jones and the State Prosecuting Attorney on February 12, 2018 in accordance with Rules 6.3(a), 9.5(b), and 68.11 of the Texas Rules of Appellate Procedure.

CERTIFICATE OF COMPLIANCE

I, Nathan E. Morey, certify that, pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(B) and 9.4(i)(3), the above response contains 8,650 words according to the "word count" feature of Microsoft Office.

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